

No. 84-1044

(4)

Supreme Court, U.S.

FILED

JAN 29 1985

ALEXANDER L. STEVENS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

**BRIEF OF
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
AS AMICUS CURIAE**

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**BRIEF OF
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Consolidated Edison Company of New York, Inc. ("Con Edison"), with consent of all parties, files this brief as *amicus curiae* urging that the Court note probable jurisdiction, and, after plenary consideration, reverse the judgment of the Supreme Court of the State of California. The Pacific Gas and Electric ("PGandE") case is of critical concern to Con Edison because Con Edison has brought a case in the New York State courts challenging an order of the Public Service Commission of the State of New York (the "New York Commission") on constitutional claims identical to those ruled on by the California court.

Interest of *Amicus Curiae*

Con Edison is an investor-owned utility that provides gas, electric, and steam service in various parts of New York City and Westchester County in New York State. As a public utility, Con Edison is subject to the regulation of the New York Commission in conducting its utility business.

On May 14, 1984, the New York Commission issued an order announcing that it would require New York State utilities such as Con Edison to send printed messages from consumer groups called Citizens' Utility Boards ("CUBs") in the utilities' billing envelopes as soon as an application for access from a qualifying CUB is received. Statement of Policy Governing the Access of Intervenor Organizations to the Extra Space in the Utilities' Billing Envelopes, issued May 14, 1984, in N.Y. P.S.C. Case 28655, attached to Jurisdictional Statement as Appendix I. An application for access from a CUB is currently pending before the New York Commission. Con Edison, with two other New York State utilities,¹ filed suit against the New York Commission asserting that the Commission's order violates the utilities' First and Fifth Amendment rights under the United States Constitution,² and argued their case before the New York Supreme Court, Special Term, on January 4, 1985.

The New York Commission's order is substantially similar to the order of the California Public Utilities Commission (the "California Commission") that was affirmed by the California Supreme Court and is at issue in this proceeding. The orders of both commissions require that the utilities in question include

1. Continental Telephone Company of New York, Inc. and New York State Electric & Gas Corporation.

2. On November 14, 1984, the New York Commission issued an order denying petitions for rehearing that had been brought by various parties other than Con Edison to challenge the Commission's order. Order Denying Petitions For Rehearing, issued November 14, 1984, in N.Y. P.S.C. Case 28655. The utility companies that requested rehearing have also sought judicial review of the Commission's order in the New York courts.

messages from organizations representing ratepayer interests in the envelopes the utilities use to send bills to customers. While the specific terms of the orders vary, the constitutional issues raised by the circumstances of each case are the same.

The actions of the New York Commission and of the California Commission call into question fundamental concepts concerning the nature of a utility's private property and its right to free speech. Both commissions would appropriate the utilities' private property, their billing envelopes and the postage used to send them, without compensation, to further the cause of organizations with interests adverse to those of the utilities. In addition, both commissions would force the utilities to use their own property to convey third-party messages with which they disagree.

Although there is no judicial opinion in the California courts because of the California Supreme Court's summary affirmation of the California Commission's order, Con Edison believes that the briefs of the parties will permit a full review of the important constitutional question presented by this appeal. If the Court declines to review the decision of the California Court, the First Amendment issues involved in both the California and the New York cases will be resolved without the benefit of a full judicial analysis. The issues raised by the actions of the California and the New York Commissions are of vital concern to the entire investor-owned utility industry and are worthy of full judicial consideration before ultimate decision.

Rather than repeat the arguments made by PG&E in its Jurisdictional Statement on the First Amendment issues, in the remainder of this brief Con Edison will only expand on certain issues touched on by PG&E.

ARGUMENT:
A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED
AND SHOULD BE FULLY HEARD BY THIS COURT.

I.

THE CALIFORNIA COURT'S DECISION DEPRIVES
PGandE OF ITS RIGHT TO FREE SPEECH
GUARANTEED BY THE FIRST AMENDMENT
TO THE UNITED STATES CONSTITUTION.

A. PGandE Is The Sole Owner Of Its Billing Envelopes And The Space Within Them.

PGandE correctly points out in its Jurisdictional Statement that PGandE is the sole owner both of its billing envelopes and all the space within the envelopes. Jurisdictional Statement, pp. 20-21. This Court made clear in *Consolidated Edison Co. of New York v. Public Service Commission*, 447 U.S. 530 (1980), that a utility's billing envelopes belong only to the utility. In that case, the Court struck down an order of the New York Commission that prevented New York utilities from including bill inserts on controversial subjects in their billing envelopes. The Court, in distinguishing cases involving rights of access to public facilities, stated that Con Edison (*id.* at 540):

"seeks merely to utilize its *own* billing envelopes to promulgate its views on controversial issues of public policy."³ (Emphasis supplied).

The holding in *Consolidated Edison* is consistent with the well-established rule that the property a utility uses in rendering service to its customers belongs solely to the utility. The cases

3. In his dissenting opinion in *Consolidated Edison*, Justice Blackmun suggested that the States might redefine property rights so as to take ownership from the utility companies and give it to the ratepayers. 447 U.S. at 556. It is not clear whether Justice Blackmun intended to suggest that such a redefinition could be effected by administrative fiat, rather than by legislative act accompanied by a provision for just compensation. In any event, his dissent on this point was not supported by any of the other Justices.

cited by PGandE establish that utility customers do not acquire an interest in the utility's property by purchasing service from the utility.

B. The Action Of The California Commission Is Not Ideologically Neutral.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court ruled that a state cannot force an individual to use his private property for the display of an ideological message dictated by the state unless there is a compelling state interest and that interest cannot be served by means less restrictive of First Amendment rights. TURN, the organization awarded access to PGandE's billing envelopes, argued in its brief to the California Supreme Court that the California Commission's action should not be considered unconstitutional under the Court's opinion in *Wooley* because the Commission is not disseminating a particular ideology. Answer of Real Party In Interest Toward Utility Rate Normalization To Petition For Writ of Review With Memorandum of Points and Authorities, July 9, 1984, p. 50. But, the action of the California Commission cannot be regarded as ideologically neutral.

By choosing TURN, an organization dedicated to representing residential ratepayers, as the group that will be allowed to put its messages in PGandE billing envelopes, the Commission has, in effect, chosen the content of the messages that PGandE must send just as the State of New Hampshire chose a message in *Wooley*. TURN will not use PGandE's envelopes to argue that the rates charged to commercial customers are being used to subsidize lower rates for residential customers. Neither will it advance any other proposition it would regard as adverse to the interests of residential customers. From the standpoint of ideological neutrality, the choice of the message carrier is as offensive as the choice of the message.⁴

4. A municipality which allowed only one political party to use the public parks to seek new members could hardly answer a claim that it was violating First Amendment rights by pointing out that its action was ideologically neutral because it was not prescribing what could be said in the parks.

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court found that the First Amendment rights of a shopping center owner were not violated by an interpretation of the California State Constitution requiring the owner to allow members of the public to exercise their free speech rights on the premises of the shopping center. The Court noted there, in distinguishing its holding in *Wooley*, that there was "no danger of governmental discrimination for or against a particular message" because no specific message had been chosen by the state for display. *Id.* at 87. Unlike the situation in *PruneYard*, in which any member of the public had equal rights of access to the shopping center, the California Commission has chosen the sole organization that will be allowed to use PGandE's property to send its messages. By making this choice, the California Commission has discriminated in favor of TURN messages on the basis of their content.

C. The California Commission Has Not Shown A State Interest Sufficiently Compelling To Justify Its Curb On PGandE's Rights To Free Speech.

As PGandE points out in its Jurisdictional Statement, the California Commission has asserted that the state's interest in assuring the fullest possible consumer participation in its regulatory proceedings and the most complete understanding of energy-related issues is sufficient justification for restricting PGandE's rights to free speech. Jurisdictional Statement, p. 23; Appendix to Jurisdictional Statement, pp. A21-22. The state interest identified by the Commission cannot be considered compelling, however, under *Buckley v. Valeo*, 424 U.S. 1 (1976), a case directly analogous to that of PGandE.

In *Buckley v. Valeo*, the Court ruled that provisions of federal law restricting the amounts of money that could be spent on political speech during election campaigns violated the First Amendment rights of those subject to the limitation. *Id.* at 58. The state interest asserted in *Buckley v. Valeo* as justification for the spending restrictions is directly comparable to the interest

claimed by the California Commission in restricting PGandE's speech.

It was argued in *Buckley* that the "governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" was sufficient justification to limit expenditures by individuals or groups on campaigns for particular candidates. *Id.* at 48. This is essentially the same as the California Commission's desire to increase the representation of consumer advocates in its regulatory proceedings. The Court held, however, that (*id.* at 48-49):

"the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."

The Court also pointed out, in striking down the limitation on expenditures a candidate could make from his own resources, that the "interest in equalizing the relative financial resources of candidates competing for elective office" was not an interest "sufficient to justify the provision's infringement of fundamental First Amendment rights." *Id.* at 54. Under *Buckley v. Valeo*, it is apparent that the California Commission's interest in enhancing the speech of TURN, or any other ratepayer organization, is not sufficient to justify the serious infringement of PGandE's First Amendment rights caused by the Commission's ruling.

CONCLUSION

The California Commission's requirement that PGandE include TURN messages in its billing envelopes raises constitutional issues of profound significance not only to PGandE and Con Edison, but to the entire investor-owned utility industry. If this Court does not give plenary consideration to PGandE's appeal, these issues will be decided for the entire industry without the benefit of a full judicial analysis. For this reason, the Court should note probable jurisdiction, and, after plenary consideration, reverse the judgment of the Supreme Court of California.

Dated: New York, New York
January 25, 1985

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